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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-909

JESSE BYRD, TRAVIS A. TAPIA
AND OFFICERS FOR JUSTICE,
Petitioners,

vs.

CHARLES R. GAIN, *et al.*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The United States Court of Appeals
For the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals For The Ninth Circuit

Respondents Charles R. Gain, Richard Siggins, Judith Ciani, Herman Gallegos, Jane Murphy, James A. Hall, Hugh C. Elbert and Edward Liggins file this Brief in opposition to the Petition for a Writ of Certiorari and pray that the Writ be denied.

QUESTIONS PRESENTED

1. Whether the decision below of the Court of Appeals for the Ninth Circuit conflicts with a decision of another Court of Appeals on the same matter.

2. Whether certiorari is appropriate in this case to review specific facts and evidence which formed the basic for a decision adverse to Petitioners.

STATEMENT OF THE CASE

On April 19, 1974, petitioner Jesse Byrd called and conducted a press conference at which print, radio and television media representatives were present. On that date, Jesse Byrd was a police officer of the San Francisco Police Department. He called the press conference on behalf of an organization of which he was a member, the Officers for Justice, which organization represented some of the uniformed members of the police department in certain aspects of employee relations.

At the press conference Officer Byrd identified him-

self as a police officer. He made a statement relating to a then on-going police operation seeking to apprehend the so-called "Zebra" killer(s). See *Williams v. Alioto*, 549 F.2d 136 (9th Cir. 1977). In the statement, Officer Byrd criticized the Zebra operation in the most inflammatory terms imaginable:

> "Ladies and gentlemen of the press, we the members of Officers for Justice, would like to make one point implicitly clear. We are just as much concerned about the apprehension of this individual or individuals as anyone else. But we do not approve of the Gestapo type tactics that are being used...
>
> "We do not see how the department can anticipate apprehending the suspects with this type of Gestapo type tactic." (C.R. 4, 15.)[1]

As a consequence of the statement made by Officer Byrd, a complaint by another police officer was made to the Internal Affairs Bureau of the police department. The substance of the complaint was that Officer Byrd's remarks were detrimental to the entire department and significantly interfered with its operations. After hearings by both the Chief of Police and the Police Commission, Officer Byrd was reprimanded in writing for violation of Department Rule 2.13. (C.R. 17.)

Earlier that same year, on March 6, 1974, petitioner Travis A. Tapia called a press conference at which representatives of the various media were present. On that date, Travis Tapia was an officer of the San Fran-

1. Respondents will adopt the same reference procedure to the Clerk's Record in the Court of Appeals as used by Petitioners.

cisco Police Department. He called the press conference on behalf of the Officers for Justice, an organization of which he was a member.

At this press conference, Officer Tapia made remarks concerning incidents which had occurred some weeks before in a park in San Francisco. Though he had not been present at the park nor seen anything that happened there, Officer Tapia criticized the police conduct on that day as having been criminal:

> "[O]nce again citizens of San Francisco's Latino community have been victimized by police crimes and official terrorism. The acts of assault upon persons under color of authority and willful inhumanity towards prisoners by some members of this Department have increased the unnecessary hatred in the community against all officers. The time has come for all of us, police and community, to join to see that justice is done, that those officers responsible for these crimes against all of San Francisco be prosecuted before a court of law..."

Officer Tapia's remarks prompted sixty-six complaints by other police officers that his statement made on behalf of a police organization undermined the order, efficiency and discipline of the department as a whole. (C.R. 20.) The Police Commission ultimately reprimanded Officer Tapia in writing for violation of Department Rule 2.13.

Petitioners filed a complaint pursuant to 42 U.S.C. § 1983, alleging that Respondents had infringed on their First Amendment freedoms and denied them equal protection of the law. Thereafter, the District Court granted Respondents summary judgment, re-

solving all the claims in the complaint in their favor. (C.R. 142.) The Court of Appeals for the Ninth Circuit affirmed. 558 F.2d 553 (9th Cir. 1977). The Court of Appeals held that the remarks made by both officers were not protected speech under the First Amendment. The appellate court recognized the principle that police officers are to be viewed differently than school teachers in terms of the discipline that may be imposed for unfounded inflammatory criticism of the employer and fellow employees. The Court of Appeals also followed a previous decision of that circuit by holding that Rule 2.13 was not facially unconstitutional, nor was it deemed unconstitutionally applied in this case.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. THE DECISION BELOW DOES NOT CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

Petitioners argue on several occasions in their Petition (see, e.g., pages 11, 13) that the Court of Appeals in the decision below refused to apply the First Amendment standards evolved in such cases as *Pickering v. Board of Education*, 391 U.S. 563 (1968). Citing numerous decisions of other circuits, petitioners seek to create the impression that the appellate decision in this case is a backward step in judicial protection of freedom of speech. A close review of both the cases cited by petitioners and the decision below demonstrates the fallacy of this argument. In fact, the Court of Appeals for the Ninth Circuit has always rendered decisions in

this area of police employer-employee relations consistent with the holdings of this Court and the other circuit courts.

First of all, the decision by the Court of Appeals herein must be read together with the decision in *Kannisto v. City and County of San Francisco*, 541 F.2d 841 (9th Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 1552, 51 L.Ed.2d 775 (1977). *Kannisto* is a virtual companion case to the instant one. In *Kannisto*, a lieutenant in the San Francisco Police Department roundly criticized a superior in front of his men at roll-call. In its decision, the Court of Appeals referred to and applied the basic principles of First Amendment analysis set forth in *Pickering*. The Court of Appeals in *Kannisto* acknowledged that police officers are not " 'relegated to a watered-down version of constitutional rights.' " (Citation omitted), *Kannisto, supra*, at 843. It further observed that Kannisto had an interest in commenting on the operations of the police department, and the public had an interest or right to be informed on matters of general interest. *Id.* Nevertheless, the Court of Appeals affirmed the dismissal[2] of Kannisto's suit brought pursuant to 42 U.S.C. § 1983.

In *Kannisto*, the Court of Appeals applied several of the criteria announced in *Pickering*. It found that the police lieutenant's employment was directly and substantially involved in the subject matter of the communication. Further it observed that the involvement of a police organization compelled consideration of

2. Petitioners herein had an opportunity to avoid an adverse judgment by submitting affidavits creating issues of fact. This they declined to do. Petition, page 9.

interests in discipline, *esprit de corps* and uniformity that do not figure in the case of a school teacher. The statements by Kannisto also obviously impacted upon persons that he would be in contact with in his daily work, and it could be expected that proper performance of police duties would be impeded by his statements. Lastly, the Court of Appeals rejected the contention that Rule 2.13 was unconstitutionally overbroad on its face or as applied. *Id*, at 843-845.

The Court of Appeals in the decision below was disinclined to write a lengthy treatise on a case lacking any novel elements to distinguish it from the holding in *Kannisto*. In the instant case, the petitioners made statements the subject matter of which related directly to their police employment. They criticized police operations in which many of their fellow officers participated, prompting in Officer Tapia's case the filing of sixty-six complaints by other police officers. The employer interests of discipline, *esprit de corps* and public acceptance of the police function clearly overbalanced whatever communicative interests were contained in statements accusing the department of "Gestapo type tactics" and of condoning and promoting "police crimes and official terrorism." The Court of Appeals in both *Kannisto* and the instant case properly distinguished the application of First Amendment standards in the case of police officers in a specific factual context from those controlling in the case of a school teacher.

The decision below in no way conflicts with the decisions of other circuits *on the same matter*. This italicized phrase from Rule 19 of the Supreme Court Rules

requires consideration of the particular *facts* of other circuit decisions. It is not enough for petitioners to invoke the provisions of Rule 19(1)(b) by pointing to the fact that several circuit decisions involved communications made by police officers. A more thorough exposition of the cited cases demonstrates that they in no way conflict with the decision or decisions (if *Kannisto* is reviewed as well) below.

Thus in *Tygrett v. Washington*, 543 F.2d 840 (D.C. Cir. 1976), the matter was returned to the District Court because of its failure to address the free speech issues inherent in the facts. In the instant case, both the Court of Appeals and the District Court applied the appropriate First Amendment tests and resolved the matter against petitioners.

In *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976), certain police officers had been disciplined for release of internal police information in violation of a department confidentiality rule. The Court of Appeals reversed the dismissal of the action by the District Court, the reversal turning on the fact that the confidential materials disclosed had already been published in a newspaper and hence could no longer be properly termed "confidential."

Contrary to the claims made by petitioners, the particular circumstances of the statements at issue herein were closely examined by the District Court. See Appendix B to the Petition, pages 17a, 21a-24a. It was hardly necessary for the Court of Appeals to engage in another long exposition of the facts in order to properly conclude that petitioners were deserving of no relief.

This Petition for a Writ of Certiorari provides further support to the observations of Judge Sneed, concurring in *Kannisto, supra*, at 845:

> "A society which accepts no accommodation [of state and First Amendments interests] save that mandated by a federal court is neither strong nor happy. Moreover, such reliance on the federal courts slowly saps their strength. Inevitably they become but another suspect mediative institution indistinguishable from those they supplanted. We have not reached that point as yet. Being required to intervene in cases such as this, however, contributes little to our avoidance of this fate."

Petitioners do little to preserve the effectiveness of the federal courts by bringing actions such as the instant one and then making an unwarranted use of every procedural device thereafter to keep the controversy alive. This Court should not reward their efforts, even temporarily, by permitting additional review of a sound exercise of judicial discretion.[3]

II. THE PETITION RAISES ISSUES SOLELY RELATING TO REVIEW OF FACTS AND EVIDENCE THAT SHOULD NOT BE RESOLVED ON A WRIT OF CERTIORARI.

A review of the Petition for a Writ of Certiorari in this case discloses that a good deal of the petitioners' arguments spring from their claims that the lower courts failed to properly review the evidence and facts before them. As was made evident by the analysis

3. See also *Hosford v. State Personnel Board*, 74 Cal.App.3d 302, 306, 141 Cal.Rptr. 354, 356 (1977); *Shipp v. Davis*, 48 Ill.App.3d 463, 362 N.E.2d 822 (1977).

supra, the District Court and Court of Appeals both applied the standard appropriate to a case involving First Amendment issues. Petitioners quarrel with the decision below by highlighting the fact that petitioners held "lower-echelon, non-policymaking positions of responsibility" in the police department. Petition, pages 3 and 11. They also emphasize that petitioners were off-duty and out of uniform when they appeared at their respective press conferences. Petition, page 6. Finally, petitioners also complain of the fact that the District Court granted summary judgment without allegedly having a sufficient factual or evidentiary record before it. Petition, pages 9, 13 and 15.

These arguments all resolve down to the common denominator that petitioners disagree with the way both lower courts interpreted the facts. It is a settled principle that a writ of certiorari is not issued in order to review the evidence or second-guess the courts most familiar with the factual record. *National Labor Relations Board v. Waterman S.S. Corp.*, 309 U.S. 206, 208 (1940); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *United States v. Johnston*, 268 U.S. 220 (1925). Petitioners argue that these facts were deserving of more respect than was accorded them below. This is no reason for the granting of their petition.

As for the fact that summary judgment was rendered below, the petitioners cannot be heard to complain of that now. Federal Rules of Civil Procedure 56(e) gives the opponent of a motion for summary judgment the option to produce affidavits if necessary.

Obviously petitioners felt that no such evidentiary materials were necessary. Thus the District Court was on the face of the moving papers confronted with no material issues of fact. Summary judgment under Rule 56 "shall be entered" in such circumstances.

Moreover, if petitioners due to the posture of the case were unable to secure affidavits in opposition to the motion, opposition pursuant to Rule 56(f) could have been made. Evidently it was not. Petitioners declined to take the opportunity when they had it to bring all material facts to the attention of the District Court. It is too late to complain about the results.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

DATED: January 10, 1978.

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CERTIFICATE OF SERVICE

I, GEORGE E. KRUEGER, attorney for Respondents herein, hereby certify that, on the 20th day of January, 1978, I caused copies of this Brief in Opposition to the Petition for a Writ of Certiorari to be served on all parties required to be served by mailing three (3) copies in a duly addressed envelope to Amitai Schwartz, Northern California Police, Practices Project, 814 Mission Street, San Francisco, California 94103; Vilma S. Martinez, Morris J. Baller, Mexican American Legal Defense and Educational Fund, 28 Geary Street, San Francisco, California 94108; Sanford Jay Rosen, Rosen, Remcho, & Henderson, 155 Montgomery Street, San Francisco, California 94108; Margaret Crosby, Alan L. Schlosser, American Civil Liberties Union Foundation of No. California, Inc., 814 Mission Street, Suite 301, San Francisco, California 94103; *Attorneys for Petitioners.*

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